No. 37217-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF:

FELIX JOSEPH D'ALLESANDRO,

PETITIONER.

SUPPLEMENTAL BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. INTRODUCTION

This supplemental brief, requested by the Court, addresses the application of four recent Washington Supreme Court decisions: *In re PRP of Morris,* __ Wn.2d __, 288 P.3d 1140, 2012 WL 5870496 (2012); *State v. Wise,*__ Wn.2d __, 288 P.3d 1113, 2012 WL 5870496 (2012); *State v. Paumier*, __ Wn.2d __, 288 P.3d 1126, 2012 WL 5870479 (2012); and *State v. Sublett,* __ Wn.2d __, __ P.3d __, 2012 WL 5870484 (2012).

This case, which has been pending for over five years, is squarely controlled by *Morris.* This court should reverse and remand for a new trial.

B. SUMMARY OF RELEVANT FACTS

The trial court twice closed the courtroom during D'Allesandro's trial—during *voir dire* and later when the court questioned a juror during trial about whether the juror knew a witness.

Prior to the start of jury selection, defense counsel asked the court to question several jurors individually—apart from other jurors.

Defense counsel stated:

> It occurred to me after we met in chambers this morning, and after I had an opportunity to review the jury questionnaires, it would make sense for the parties and the Court to interview prospective jurors who wished to speak with us privately, to do those interviews prior to voir dire, and my rationale is that if those interviews result in any excuses for cause, it would diminish the pool right off the bat, and secondly and perhaps more importantly from my perspective we don't run the risk of tainting the remaining pool, if we do it on the front end as opposed to doing it on the back end. And I know there are a lot of people in the -- on this side of the bar in the well, and

> normally, at least in my experience, those interviews are conducted in chambers, and I would suggest that those interviews take place in an empty courtroom. **By that I mean apart from the remaining prospective jurors.**

Counsel for the co-defendant then concurred, noting that by questioning jurors one by one, it would avoid "tainting the larger pool." The Court then *added* that individual questioning would take place in a closed courtroom:

> THE COURT: Well, all of the attorneys are in agreement, and I don't find myself in disagreement, **but I maybe would like to make a further suggestion.** The jurors have been waiting a long time so I would like to invite them in and tell them something about how this process is working, and then **it occurs to me that in addition to those who we've flagged as -- on the basis that they wanted to be asked certain questions in private instead of in public, private meaning in the presence of the attorneys, the defendants, the clerk, so on it doesn't mean absolute privacy, but it means outside of what's open to the general public -- and that's a procedure we generally afford jurors out of respect for their privacy.** They're not the ones on trial here, and sometimes there are personal and embarrassing matters that they want to properly disclose, but shouldn't be made to do so in the glare of the whole community necessarily.

The court continued:

> **I'm thinking maybe what we'll do is maybe close this courtroom temporarily.** I mean the trial's going to be open to the public, but for these in camera interviews, maybe we'll just ask members of the public to leave. Then we don't have to upset the counsel table, the court reporter and everybody else, and then open the door again to whoever wants to attend once we're not talking privately with a particular juror. I think that might be a way to do that. I see there's (*sic*) some observers here, which are welcome to be here throughout the trial, but what we're talking about is how do we pick everybody else up and move them into the judge's chambers? There's (*sic*)quite a few people here to even fit into a judge's chambers plus a juror. Our chambers are not that large so I think that's the common-sense way to do this.

D'Allesandro supplied declarations to his PRP that explained what happened as a result of the court order excluding all members of the public from the jury selection that took place in a closed courtroom.

D'Allesandro's mother, Carol Welch, explained:

> 6. In addition, given the negative portrayal in the press, I thought it was especially important to make sure that potential jurors knew my husband and I were completely supportive of our son.
>
> 7. For those reasons, my husband and I planned to attend all-of voir dire. My husband and I were in the courtroom when the trial began. After the attorneys had a brief discussion with the judge about how to conduct voir dire in light of the pretrial publicity, the judge told us (as well the other members of the public who were present) that we would have to leave the courtroom.
>
> 8. My husband and I approached the bailiff to make sure we had to leave the courtroom. We explained that one of the defendants was our son. He said the judge had ordered the public out of the courtroom, and that included family members.
>
> 9. Prior to being told to leave, I was not given an opportunity to object. No one was.
>
> 10. In had been asked if I objected to closing the courtroom, I would have objected.
>
> 11. If I had been given an opportunity, I would have explained that I thought jury selection was the most important part of my son's trial.
>
> 12. Because we were excluded, we were not able to assist our son and his attorney during jury selection. Because I was aware of the publicity surrounding my son's case and know many people who live in the Thurston County area, I felt that I should have been able to pass along any information or insights regarding prospective jurors to my son's attorney. Obviously, I was not able to do this as a result of the courtroom closure.

13. When the court ordered us to leave, my husband and I reluctantly left and sat outside the courtroom.

14. As we sat outside with the other people who had been excluded, we talked among ourselves about why we had been excluded and whether it was right. We did not think it was fair.

15. After we were told that we could come back in the courtroom, we did.

16. However, sometime after testimony had begun, we were told for the second time that we would need to leave the courtroom so that the judge could question a juror. We were surprised that the judge could close the courtroom and exclude the public whenever he wanted.

17. Once again, we were not given a chance to object before we were told to leave.

18. Once again, I would have objected if given the opportunity.

19. I have since read the transcript of the portion of jury selection from which I was excluded. Having read the transcript I feel even more strongly that I should not have been excluded.

20. For example, I now know that Juror 11 (who was questioned in a closed courtroom during trial) stated that she knew one of the witnesses. That witness was the girlfriend of the co-defendant's brother. I am aware that the juror, the co-defendant's brother, and the girlfriend all attended Evergreen State College. This is especially concerning given the antagonistic defenses presented by my son and his codefendant. Had we heard her statements, I feel that I could have assisted my son and his attorney.

21. I have always believed that our courts must be open. I was shattered when that did not happen in my son's case.

See Appendix E to PRP.

D'Allesandro's father, Felix D'Allesandro, Jr., submitted a similar declaration. See *Appendix F* to PRP. He added: "I did not feel like I had

any choice-or any voice in the matter. I was told to leave and followed the court's direction. Sometimes I wish I had interrupted the court proceedings and made my feelings known. However, I respect the justice system and would not do anything to jeopardize a fair trial for my son, or for anyone else." *Id.*

The State did not contest these declarations.

As mentioned, during the trial, the court again closed the courtroom to inquire whether a juror knew one of the witnesses. RP 734-735. The court directed "all of you [the audience] to just file out temporarily and then you'll be welcome to come back in." The reasoned that closing the courtroom was easier than moving the parties into chambers. RP 733. During the inquiry, Juror 11 reported that the witness "may have gone to school with one of my friends, to college. I just recognize her so I'm not sure if it's for sure the same person." RP 734. Juror 11 assured the court that she could remain impartial. RP 737. After the court determined that there was no basis for disqualifying the juror, the courtroom was re-opened. RP 738.

C. ARGUMENT

This case is squarely controlled by Washington Supreme Court precedent. There are now many cases supporting reversal of D'Allesandro's conviction and none that justify or excuse the closure of

parts of D'Allesandro's trial. Most significantly, *Morris* (and *In re Pers. Restraint of Orange,* 152 Wn.2d 795, 812, 100 P.3d 291 (2004)) is completely on point. Appellate counsel's failure to raise the closed courtroom issue in D'Allesandro's *Petition for Review* was deficient performance which prejudiced D'Allesandro. This Court should immediately grant this petition.

Defense Counsel Requested to Question Jurors Individually. The Trial Court Announced the Court Would Be Closed.

At trial, defense counsel requested *individual* questioning of jurors. Questioning a potential juror apart from other potential jurors does not constitute a courtroom closure. Individual questioning of jurors also does not require removing the public from the courtroom. Defense counsel asked for "private" questioning of prospective jurors and then told the judge what he meant by private: "By that I mean apart from the remaining prospective jurors." Counsel for the co-defendant reinforced the need to keep the answers of one prospective juror away from the remainder. Neither counsel argued to remove the public.

It was the judge who added that the court would be closed, noting that it was the court's practice to always close the court for voir dire on sensitive topics. Usually, questioning took place in chambers. In this case, the court decided to conduct that portion of trial in a closed courtroom.

It is certainly true that defense counsel did not object. However, in *Paumier, Wise* and *Morris*, the Washington Supreme Court reaffirmed that a defendant does not waive his right to a public trial by failing to object to a closure at trial. *Wise, supra* at ¶ 22 ("Wise did not object when the trial court moved part of the voir dire proceedings into chambers."); *Paumier, supra* at ¶ 3 ("The prosecution, defense counsel, and Paumier were all present for the questioning and offered no objections."); *Morris, supra* at ¶ 17 (finding that Morris waived his right to be present, but only after and perhaps because trial court declared intention to close courtroom).

In addition, the Washington Supreme Court considered and rejected this same argument in *State v. Strode,* 167 Wash.2d 222, 229, 217 P.3d 310 (2009) ("The State also asserts that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors. However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal."). *Strode* added that the "right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner." *Id.* at 229 n. 3. In other words, in order for D'Allesandro to waive his right to a public trial, the record must be clear that D'Allesandro himself understood

that voir dire in a closed courtroom implicated the right to a public trial and that D'Allesandro himself voluntarily sought to waive that right. That is precisely why a *Bone-Club* hearing is required in every case.

Here, because the trial court did not conduct a pre-closure hearing, there is absolutely no indication that D'Allesando himself was informed of the constitutional implications of voir dire in an empty courtroom, but still sought to waive his right to a public trial.

Failure to Conduct a Bone-Club Hearing Prior to a Closure is a Structural Error. A Bone-Club Hearing Took Place in Momah.

A complete pre-closure is required in order to "invite" or "waive" this issue. No pre-closure hearing took place in this case. Failure to conduct a *Bone-Club* hearing is a structural error mandating reversal. *Paumier* held:

> The trial court's failure to conduct a *Bone–Club* analysis was structural error that warrants reversal on appeal, with or without a contemporaneous objection. To be clear, our holding does not preclude a trial judge from closing a courtroom for individual questioning. Rather, our holding merely requires a trial court to conduct a *Bone–Club* analysis first. Because that analysis was not conducted here, Paumier is entitled to a new trial.

Id. at ¶ 14. *Wise* added: "The error that Wise alleges, however—the closure of voir dire for the individual questioning of a number of prospective jurors in chambers without considering the *Bone–Club* factors—is structural error." *Wise,* at ¶ 21.

In contrast, the trial court conducted a pre-closure hearing in *State v. Momah,* 167 Wash.2d 140, 152, 217 P.3d 321 (2009). *Wise* made it clear that *Momah* presented a unique set of facts—which are readily distinguished from this case. "We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone–Club.*" *Id.* at ¶ 20.

Wise continued:

> *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone–Club* factors. At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone–Club,* the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

Wise, at ¶ 20.

In this case, the trial court did not conduct any portion of the required *Bone-Club* hearing.

Morris Controls

In *Morris*, the Washington Supreme Court granted a PRP finding that appellate counsel was ineffective for failing to raise the courtroom closure issue on direct appeal. In *Morris,* after conducting some of the voir dire proceedings in the courtroom, the trial court announced, "Well, Ladies and Gentlemen, we have some interviews to do of those people who

indicated they wanted to talk privately. We have quite a few of those to do, actually." "The trial court then moved proceedings into chambers." *Id.* at ¶ 3. The Supreme Court added:

> Neither the State nor counsel for Morris moved for the private voir dire and neither objected to conducting the proceedings in chambers. However, Morris did waive his own right to be present during the portion of voir dire conducted in chambers. In so waiving his right to be present, defense counsel indicated that "it would be more likely for jurors to be more forthcoming with what they are talking about if [Morris] were not in the room."

Id. at ¶ 4.

The Supreme Court concluded that appellate counsel should have raised the error on direct appeal. The Court held:

> Here, Morris's appellate counsel should have known to raise the public trial right issue even though we had yet to decide *Strode.* Morris filed his appeal in March 2005. *Orange* had been decided at that time and clarified, without qualification, both that *Bone–Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal. *Orange,* 152 Wash.2d at 807–08, 814, 100 P.3d 291.
>
> Morris's appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a *Bone–Club* analysis. This case is no different from the situation in *Orange* where the appellate counsel failed to raise the public trial right issue. In *Orange,* "[t]he failure to raise the courtroom closure issue was not the product of 'strategic' or 'tactical' thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal." 152 Wash.2d at 814, 100 P.3d 291. The *Orange* rule derived from the clear rule in *Bone–Club.* 152 Wash.2d at 812, 100 P.3d 291. The court reasoned that "had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in *Bone–Club,* remand for a new trial." *Id.* at 814, 100 P.3d 291. We

> accordingly remanded for a new trial in Orange. *Id.* We do the same here.

Id. at ¶ 19-20. D'Allesandro's petition for review, which was filed in October 2006, omitted the closed courtroom issue. If appellate counsel had raised the issue, it is likely that the Supreme Court would have accepted review and reversed. It would be hard to imagine a case more on point than *Morris.*

D'Allesandro Has Shown Harm Although None is Required

D'Allesandro has shown specific harm: the exclusion of family members from the beginning of the trial. As the Washington Supreme Court previously recognized in *Orange,* also a PRP, "(a)s a result of the unconstitutional courtroom closure in the present case, what the prospective jurors saw, as they entered and exited the courtroom during at least the first two days of voir dire, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it." *In re Pers. Restraint of Orange,* 152 Wn.2d at 812.

The declarations submitted in support of D'Allesandro's petition demonstrate several harms that resulted from the closure of the courtroom. D'Allesandro's parents were conspicuously absent at the beginning of trial. They were not able to assist with jury selection—and would have been able to provide real assistance. In addition, their exclusion was an affront to the values that underpin the right to an open trial—a value completely ignored

by the trial judge. This case demonstrates exactly why a *Bone-Club* hearing is required in every case. A *Bone-Club* hearing reminds the court and participants that openness is critical to the integrity and trust of the judicial system. That value went unrecognized in this case.

There Was No Reason to Close the Courtroom to Question a Juror

In *Sublett,* this Court held that history and logic guide the evaluation of whether a hearing, not clearly protected by the public trial right, should be open. Federal courts have held that mid-trial questioning of jurors about possible misconduct are not presumptively open. *United States v. Edwards,* 823 F.2d 111 (5th Cir. 1987). On the other hand, right of public access attaches to post-trial hearings to investigate jury misconduct. *United States v. Simone*, 14 F.3d 833 (3rd Cir. 1994). The reason that mid-trial questioning about potential misconduct is presumptively closed is to protect the interest in preserving the jury as an impartial, functioning, deliberative body. *Edwards* specifically did not foreclose the possibility that the right to an open and public trial might require that proceedings involving the questioning of jurors be held in open court. *Id.*

This case does not involve questioning a juror about misconduct. Instead, it involved a follow up question regarding a juror's ability to impartially serve. There was no danger of interfering with the integrity of the jury as a deliberative body as the result of questioning this juror in an open court. On the other hand, there was obvious value to conducting the

questioning in open court. The juror was asked whether the juror knew a witness. Asking the question in open court could serve to promote honesty.

This Court does not need to reach this issue because the earlier closure mandates reversal. However, the trial judge's failure to conduct a pre-closure hearing prior to questioning the juror constitutes a separate violation of the public trial mandating reversal.

C. CONCLUSION

In its first response to this PRP, the State argued that D'Allesandro's case was like *Strode*, which had not yet been decided by the Washington Supreme Court. The State was correct when they filed that response more than four years ago. Of course, the Washington Supreme Court reversed and remanded for a new trial in *Strode.* Subsequent cases have strengthened the holding in *Strode;* limited the application of *Momah;* and made it clear that a defendant is prejudiced when appellate counsel failed to raise a meritorious "closed courtroom" claim to a reviewing court.

Based on the above, this Court should reverse and remand for a new trial.

DATED this 27th day of December, 2012.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on December 27, 2012, I served a copy of this supplemental brief on opposing counsel by sending it attached to an email directed to the Thurston County Prosecutor's Appellate Division.

December 27, 2012//Portland, OR
Date and Place

/s/Jeffrey E. Ellis
Jeffrey Ellis